BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JERRY KYLES	)	
Claimant	)	
	)	
VS.	)	
	)	
TOPEKA HEALTHCARE CENTER	)	
Respondent	)	
	)	Docket Nos. 236,907; 239,983;
	)	247,912; 247,913
	)	& 255,055
AND	)	
	)	
CONTINENTAL NATIONAL AMERICAN	)	
GENERAL ACCIDENT INSURANCE/CGU	)	
Insurance Carriers	)	

ORDER

Claimant requested review of the November 21, 2005 Award by Administrative Law Judge (ALJ) Bryce D. Benedict. The Board heard oral argument on March 1, 2006.

APPEARANCES

John J. Bryan, of Topeka, Kansas, appeared for the claimant. Gregory D. Worth, of Roeland Park, Kansas, appeared for respondent and its insurance carrier Continental National American (Continental). Michael R. Kauphusman, of Overland Park, Kansas, appeared for respondent and its insurance carrier General Accident Insurance/CGU (CGU).[1]

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument to the Board the parties agreed to the following:

[1] Although these claims were, for convenience purposes, tried at the same time, separate awards are required. Respondent and Continental are involved in the first 4 claims while respondent and CGU are only involved in Docket No, 255,055.

1. None of the parties dispute the Award made in Docket Nos. 239,983 and 247,912;

2. The parties stipulated to an average weekly wage of $482.00 in Docket No. 236,907 and $498.00 in Docket No. 255,055[2];

3. The Award failed to include in the record the deposition of Dr. Barry Rose, taken on September 20, 2005, and the parties are in agreement that his deposition should be considered part of the record; and

4. In Docket No. 255,055 the Award references an award for temporary total disability (TTD) from March 14, 2000 to October 28, 2000, a period of 32.71 weeks. Neither party, nor the carriers dispute claimant's entitlement to and his receipt of these monies, but respondent and CGU contend that while it paid those funds, the dates reflected in the order are inaccurate. And it contends respondent and Continental are responsible for the payment of those funds as they were paid while claimant was recovering from his knee replacement surgery, which the ALJ found was attributable to the injury reflected in Docket No. 236,907.

ISSUES

The ALJ found that claimant suffered injury on February 2, 1998[3], in September 1999[4], and March 13, 2000[5]. The remaining two claims are, pursuant to the parties' stipulation, not the subject of this appeal. Therefore, the findings and conclusions made in Docket Nos. 239,983 and 247,912 are hereby affirmed in all respects.

In the first docketed claim, Docket No. 236,907, the ALJ awarded claimant 12 percent to the right lower extremity based upon the opinions of Drs. Prostic and Rose. He also determined that claimant's knee replacement surgery, which took place in February 2003, was attributable to the February 2, 1998 accident. Accordingly, respondent and its carrier on the risk as of that date, Continental, were held responsible for the outstanding medical bills attributable to that surgery. The ALJ did not assess the 32.71 weeks of TTD benefits paid to claimant following that procedure against Continental in Docket No.

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[2] Based upon this agreement, the calculations will be modified in the final award paragraph.

[3] Docket No. 236,907.

[4] Docket No. 247,913.

[5] Docket No. 255,055.

236,907. Rather, that element was listed in the Award in Docket No. 255,055, against respondent and its carrier for a later accident.

The ALJ concluded claimant failed to prove he suffered a permanent partial impairment as a result of the September 1999 accident, Docket No. 247,913 or in the March 2000 accident, Docket No. 255,055.[6] But because respondent was unable to accommodate claimant following the March 2000 accident, the ALJ concluded claimant was entitled to a work disability (permanent partial general body disability greater than the functional impairment) under K.S.A. 44-510e(a).

The ALJ found the claimant failed to meet his burden to establish he sustained a task loss as a result of the March 2000 accident. He did, however, find claimant had sustained a wage loss of 100 percent from June 19, 2000 to December 17, 2000, which when averaged with a 0 percent task loss, yields a 50 percent work disability. Thereafter, claimant was employed by two separate consecutive employers earning anywhere from $9.00 per hour ($360 per week) to $10.55 per hour ($422 per week). These subsequent periods of employment yielded additional work disability findings of 13.8 percent (commencing December 18, 2000 when he began working for $9.00 per hour) and on June 18, 2000 (when he began working for $10.55 per hour) the work disability decreased to 7.6 percent. Because the weeks of ppd he had already received exceeded the value of the 7.6 percent work disability, no further benefits were due.

Claimant appealed the ALJ's Award alleging a variety of errors. Highly summarized, claimant maintains the ALJ's assessment of his knee impairment is far too low and should be increased to at least 37 percent. He also maintains he satisfied his evidentiary burden on task loss, and that the ALJ erred in failing to find a 68 percent task loss attributable to his last accident in March 2000.

Claimant also maintains the ALJ erroneously calculated his post-injury wage loss. Claimant believes his wage loss increased to 100 percent as of May 18, 2004, when he was terminated by Washburn University, his subsequent employer. The ALJ found that claimant's termination from Washburn's employment was causally unrelated to his March 2000 accident. Thus, he imputed the value of Washburn wages to claimant and in doing so, his wage loss was minimal. Claimant alleges it was improper to impute that wage as the evidence, taken as a whole, indicates claimant was unable to perform his job at Washburn and was ultimately discharged due to that inability to perform. Put another way, claimant should not have taken that job and his ill-advised willingness to work at a job he was not suited for should not effectively defeat his work disability claim.

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[6] The ALJ's Award references the *"May 2000"* accident, but this appears to be a typographical error as no accident is pled on that date. ALJ Award (Nov. 21, 2005) at 8.

Respondent and Continental argue that the claimant failed to meet his burden of proof to establish the nature and extent of any functional impairment resulting from the February 2, 1998 or September 13, 1999 accidents. More importantly, they allege the ALJ erred in assessing the outstanding costs of the knee replacement surgery in 2003 to the 1998 accident. Finally, respondent and Continental contend the March 13, 2000 accident constitutes an intervening accident which left claimant with a permanent impairment to his knee, which led to claimant's ultimate need for a knee replacement. Thus, respondent and its subsequent carrier, CGU, should be responsible for both medical benefits and the TTD paid to claimant as a result of that procedure.

Respondent and CGU likewise argue that claimant has failed to meet his burden on the issue of the nature and extent of his permanent impairment attributable to the March 2000 accident. In addition, they contend that claimant's low back and right knee problems pre-existed the March 2000 accident. Respondent and CGU believe the ALJ correctly found that claimant had established a 0 percent task loss. They do, however, take issue with the ALJ's conclusion that claimant's wage loss is causally connected to the March 2000 accident, particularly after he was terminated by Washburn University in June 2004, following a work-related injury.

The issues to be addressed in this appeal are as follows:

In Docket No. 236,907:

1. The nature and extent of claimant's permanent impairment; and

2. Future medical treatment.

In Docket No. 247,913:

1. The nature and extent of claimant's permanent impairment; and

2. Future medical treatment.

In Docket No. 255,055:

1. Whether claimant met with personal injury on the date alleged;

2. The nature and extent of claimant's impairment, including work disability; and

3. Future medical treatment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Findings of Fact

1. On February 2, 1998 claimant injured his right knee while using his knee to push a switch on a snake drain. The compensability of this claim is not in dispute.[7]

2. Claimant was referred to Dr. Sergio Delgado for treatment and he performed knee surgery on March 10, 1998. This first surgery was to address a tear of the medial meniscus. Claimant returned to work at full duty in late April 1998, but he continued to complain of knee pain.

3. On September 16, 1998, Dr. Delgado again operated, and additional tearing of the posterior horn of the medial meniscus was identified and repaired. Claimant again returned to work at full duty.[8]

4. Claimant's complaints continued and his care and treatment were provided by a variety of physicians who did not testify. On March 31, 1999, he again underwent a surgical procedure, this time an arthroscopic partial meniscectomy.

5. Claimant again returned to work at full duty and on September 13, 1999, he alleges additional injury to his low back and right leg while lifting and turning a toilet.[9] The compensability of this claim is not in dispute.[10] According to the stipulations, very little medical treatment was received and claimant returned to work without any restrictions.

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[7] Respondent and Continental's Submittal Brief at 3 (filed Oct. 3, 2005).

[8] Claimant also alleged a second injury on November 10, 1998, (Docket No. 239,983) but respondent has denied the compensability of any such alleged accident. The ALJ declined to award any compensation on that claim based upon a lack of proof and pursuant to the parties' stipulations, that docketed claim is not the focus of this appeal.

[9] Claimant also alleged a *series* of accidents culminating on September 13, 1999, (Docket No. 247,912) and respondent denied the compensability of this claim. The ALJ declined to award compensation in that claim as he concluded there was no evidence to support the claim and at oral argument, the parties agreed that this claim was not at issue and could be affirmed.

[10] *Id.* at 3 (Oct. 4, 2005).

6. According to claimant, he hurt his back in September of 1999, but indicated that he hardly remembered that incident.[11] He explained that injury was not a problem until March of 2000, when he engaged in an extended period of installing air conditioners. He testified that during and after that activity, his back "flared up then and it's been worse ever since then."[12] He repeatedly points to installing the air conditioners in March 2000 as the identifiable point in time when his back constantly hurt. And after that accident his knee would also swell.[13]

7. There are references in the record to an evaluation by Dr. Philip Baker, but he neither testified, nor did the parties stipulate into evidence Dr. Baker's written reports or records. The evidentiary record suggests Dr. Baker assessed a permanent impairment and imposed restrictions upon claimant at some point. However, the ALJ correctly concluded those opinions could not be considered.[14] In any event, there is apparently no dispute that respondent could not accommodate claimant and his physical limitations. He was terminated as of June 19, 2000.

8. Claimant received unemployment until December 18, 2000 when he obtained employment with Mainline Printing as a cutter. This position paid $9.00 per hour.[15] According to claimant, this job required him to stand for a good portion of the work day. Although he believed it to be hard work, it was not as demanding as the work he had done for respondent. Claimant testified that he did not disclose his restrictions to this employer.

9. At his attorney's request, claimant was evaluated by Dr. Edward J. Prostic on October 11, 2000. At this point claimant had already had three knee surgeries. According to Dr. Prostic, claimant complained of pain primarily in the low back and some pain in his right knee anteriorly and laterally. The knee would also swell laterally, click and pop.

10. Dr. Prostic diagnosed a sprain and strain of the low back which had aggravated pre-existing degenerative disc disease and a post-surgical knee that lacks almost the entire medial meniscus which "will eventually require total knee replacement arthroplasty."[16] Dr. Prostic imposed lifting restrictions attributable to the back complaints along with

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[11] R.H. Trans. at 53.

[12] P.H. Trans. (Feb. 15, 2001) at 23.

[13] *Id.* 35-36.

[14] K.S.A. 44-519.

[15] If there were any fringe benefits, they are not contained within the record.

[16] Prostic Depo., Ex. 2 at 3. (Oct. 11, 2000 Report).

medications and therapeutic exercise. No ratings were issued at this time, nor did Dr. Prostic differentiate or apportion his diagnoses as between the accidents.

11. In May 2001, claimant left Mainline Printing and became re-employed in June 2001 at Washburn University. This position was as a HVAC mechanic. Although the job involved many of the same duties as his position with respondent, this job afforded him more assistance and was less stressful. According to claimant, he did not disclose his work restrictions when he applied for this job.

12. Tim Wyrek, the facility supervisor at Washburn University testified that claimant's job as a HVAC technician was not usually a physically demanding job. He further testified that claimant suffered two compensable injuries while working for Washburn. While employed for Washburn, claimant underwent a knee replacement procedure and was able to return to work and perform his normal work duties. But after his second work-related injury with Washburn, the resulting restrictions were such that Washburn was unable to accommodate him and he was terminated as of May 2004. Claimant concedes that Washburn's determination to terminate his employment was due to its inability to accommodate the restrictions issued as a result of his work-related injury while in Washburn's employ.

13. At respondent's request,[17] claimant was examined by Dr. Steve Hendler, a board certified physiatrist, in February 2002. Dr. Hendler saw claimant after his first three surgeries and before the knee replacement. He indicated he believed the March 2000 accident represented only a temporary aggravation of claimant's pre-existing back injury. And he further opined claimant had no additional permanent impairment to either his knee or his back as a result of the March 2000 accident.[18] Based upon the transcript, it does not appear that Dr. Hendler had a good grasp on the sequence of events, the mechanism of the claimant's claimed injuries, or of his past or present complaints.

14. The ALJ concluded "Dr. Hendler's testimony was so handicapped by his being provided insufficient information that the Court must disregard it."[19]

15. Dr. Barry Rose, the orthopaedic surgeon who treated claimant's knee and performed the knee replacement surgery, testified that claimant relayed to him a long history of knee problems dating back to 1998. As of December 2002, he found claimant to have a mildly bowing right knee with arthritic changes that were otherwise stable. He

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[17] This request was made by counsel for respondent and CGU.

[18] Hendler Depo. Ex. 2 at 4-5.

[19] ALJ Award (Nov. 21, 2005) at 8.

offered a knee replacement and in February 2003, claimant returned seeking the suggested treatment.

16. On February 27, 2003, claimant had a total right knee replacement and Dr. Rose initially reported claimant had a good result with no complications. At his deposition, he indicated claimant's result was "fair".

17. Claimant returned claimant to sedentary work in May, and in July 2003 claimant was released to return to full duty. In March 2004, claimant returned to Dr. Rose complaining of occasional knee pain after a day's work and also of back problems. He explained to Dr. Rose that he recently hurt his back carrying air conditioning units, but that someone else was treating him for those complaints.[20]

18. Dr. Rose sent claimant for a functional capacities evaluation (FCE) for an overall assessment of his capabilities. At his deposition, he adopted the restrictions recommended in the FCE, which included not only the knee, but the back as well. These restrictions were as follows: sedentary work only, which is characterized as exerting up to 10 pounds of force occasionally and/or a negligible amount of force frequently to lift, carry, push, pull or otherwise move objects, including human bodies. Dr. Rose also testified that of the 19 tasks claimant performed before his injury, he was unable to perform 14, leaving him with a 70 percent task loss. As noted by the ALJ, there is no indication whether all or part of this task loss is attributable to any given accident, or to claimant's subsequent accidents while employed by Washburn University.

19. Dr. Rose assessed a 20 percent permanent partial impairment to claimant's right knee based upon his examination findings. This rating is not apportioned as between any particular accident. Rather, it represents claimant's overall impairment as of the date he released claimant. When asked, he indicated that after the first 3 surgeries, claimant's permanent partial impairment was possibly 12 percent to the knee.[21] And after his knee surgery, claimant would have accrued an additional 8 percent to the knee, for a total of 20 percent. On cross examination, Dr. Rose conceded that based upon diagnosis only as indicated in the *Guides*, claimant's "fair" result would equate to a 50 percent permanent impairment while a "good" result would yield a 37 percent. Thus, he conceded that he believed he rated claimant's knee too low based upon the *Guides.*

20. The ALJ noted that "Dr. Rose was not provided . . . with a comprehensive history but only disjointed bits and pieces."[22]

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[20] This injury took place while claimant was a HVAC technician for Washburn University.

[21] Rose Depo. at 21-22.

[22] ALJ Award (Nov. 21, 2005) at 8.

21. Dr. Prostic saw claimant again on March 15, 2004. At this point claimant had a totally replaced right knee, had been working for Washburn University and had sustained two additional injuries while in Washburn's employ. Dr. Prostic noted good stability, no significant tenderness, normal alignment and no swelling, erythema or atrophy. Dr. Prostic opined that claimant had "sustained numerous injuries to his right knee and low back. He has good response to total knee replacement arthroplasty".[23] He went on to assess a 15 percent *to the body as a whole* for the total knee replacement. He refused to assess any permanency for the low back as he was undergoing treatment for a recent injury lifting air conditioners.[24]

22. On November 10, 2004, Dr. Prostic issued a 3rd report. This report reveals Dr. Prostic's opinion that claimant has sustained injuries "to numerous areas of his body."[25] He continued to diagnose a chronic sprain and strain of the lumbar spine and adopted the restrictions imposed by Dr. Rose. He assigned a 10 percent to the whole body for the lumbar spine and a 15 percent to the whole body for the right knee.[26] This report does not attempt to apportion the back or knee impairment ratings as between any given accident.

23. At his deposition, Dr. Prostic testified that after the first two knee surgeries and as of his first examination of claimant on October 11, 2000, claimant bore a permanent partial impairment to his right knee for the partial medial meniscectomy and degenerative changes in the patella femoral joint of "somewhere in the range of 5 percent."[27] After the total knee replacement, claimant had a total of 37 percent impairment.

24. When asked to review the task loss analysis prepared by Bud Langston, Dr. Prostic testified that claimant lost the ability to perform 13 of the 19 pre-injury tasks identified by Mr. Langston. This translates to a 68 percent task loss, which claimant contends is uncontroverted. Dr. Prostic was asked to identify which of the 19 tasks were precluded based upon either the knee and the back. After having done that, it was his testimony that claimant is no longer able to perform 10 of the 19 tasks due to his back injury, which yields a 53 percent task loss.

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[23] Prostic Depo, Ex. 3 at 2. (Mar. 15, 2004 Report).

[24] Again, this is the injury at Washburn University.

[25] Prostic Depo., Ex. 4 at 2. (Nov. 10, 2004 Report).

[26] This 15 percent to the whole body encompasses a "good" result for the knee replacement procedure and before conversion, reflects a 37 percent permanent impairment to the right knee.

[27] *Id.* at 6-7.

25. Claimant has been unemployed since being terminated from his position at Washburn. Claimant told Bud Langston that he had been looking for employment since he left Washburn. Unfortunately, there is no further evidence in the record which discloses the extent of claimant's efforts. He did testify, however, that when his Social Security Disability was granted, he stopped looking for work.

26. When claimant left respondent's employ, he requested and received approximately $870, after taxes, from a company identified as MFS Retirement Services. The record discloses no more definitive information than this.

Conclusions of Law

Docket No. 236,907

By all accounts, this claim involves only claimant's right knee and is therefore a scheduled injury.[28] Claimant boldly suggests that because the employer is the same for all the injuries, "[p]erhaps the most reasonable assessment to be given of knee functional impairment is a split between treating doctor Rose's estimate of his own work at a 50% impairment and Dr. Prostic's optimistic outlook at 37%."[29] Respondent and Continental obviously disagree and contend claimant either failed to establish it was more probably true than not that any impairment resulted *from the February 1998 accident*, or if claimant did meet his burden, it was the 12 percent to the knee awarded by the ALJ.

Respondent's argument is somewhat bolstered by the ALJ's observation that this case has, for whatever reason, been significantly delayed. After leaving respondent's employ, claimant went on to work for two other employers and sustained two separate subsequent work-related injuries to the same areas of the body. The ALJ was not provided with testimony from the physician who performed 3 of the knee surgeries. There was apparently at least one rating rendered early on the progress of these cases, but that physician was not asked to provide his opinions at trial. None of the testifying physicians seem to have had all of the relevant medical records, nor an adequate much less complete history of claimant's accident(s). Moreover, there are a significant number of medical records from physicians that are referenced by both parties and the testifying physicians which are not contained within the evidentiary record. The Board has routinely requested that parties limit the record to only those records that are essential to the parties' claims and arguments. In this instance, the parties seem to have gone to the other extreme. As a result, there appears to be only the barest of outline of the claimant's treatment history, thus making it difficult to ascertain the true nature of claimant's injuries and complaints.

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[28] K.S.A. 44-510d.

[29] Claimant's Brief at 1 (filed Jan. 13, 2006).

The ALJ awarded 12 percent for the right knee based upon Dr. Rose's testimony. But he also concluded that the knee replacement that took place in 2003 was attributable to this first accident. But the 12 percent does not take into consideration the resulting impairment from that procedure. Of the two physicians who testified, both provided testimony as to the relative impairments they assigned for that procedure. Dr. Prostic assigned a "good" result (37 percent) while Dr. Rose ultimately assigned a "fair" result (50 percent).

The Board has considered the record and the claimant's testimony and a majority of the Board concludes that the knee replacement is attributable to the first accident and as such, the 12 percent permanent impairment to the knee must be increased to reflect the subsequent procedure. Claimant continued to suffer complaints from his original knee injury and endured repeated knee surgeries, each time having more and more of his meniscus removed until it became inevitable that he would require a knee replacement. Dr. Prostic advised claimant of this fact in October 2000, before he went on to his employment with Mainline Printing and Washburn University. While it is true that he went on to sustain subsequent injuries, based upon this record it does not appear that those injuries caused his knee to significantly or permanently worsen, independent of the lack of meniscus which was necessitated by the February 1998 accident.

Accordingly, the Board affirms the conclusion that the knee replacement procedure, including the TTD benefits and the associated medical costs (both those paid by CGU and those identified at the regular hearing) are attributable to the February 1998 accident. The Board, however, modifies the Award to reflect a 37 percent permanent partial impairment to the right knee. The Board has disregarded Dr. Rose's 12 percent impairment rating as he conceded that he mis-applied the *Guides*.

Docket No. 247,913

The ALJ refused to award benefits on this docketed claim. Given the respondent's stipulation that an accident occurred on September 13, 1999, the ALJ must have concluded there was insufficient evidence to establish the nature and extent of claimant's impairment relative to this docketed claim.[30]

As was the case in the earlier docketed claim, the evidence on this accident is sparse, at best. Claimant testified that he hurt his low back and right leg while working on a toilet and turning it over. But at the preliminary hearing, he explained that he remembered very little about this event. He apparently did not miss any time from work

[30] Unfortunately, the ALJ failed to acknowledge the medical benefits paid by respondent for this otherwise compensable injury. Thus, the Board will modify the Award to properly reflect claimant's entitlement to the medical benefits paid and to future medical benefits upon proper application.

and returned to regular duties shortly after this event. Respondent paid no TTD benefits and only $813.99 in medical benefits. Claimant even went on to testify that while he hurt his back on this date, his symptoms became far more significant after the March 2000 accident. Thus, it appears that this September 19, 1999 accident did not cause him any longstanding problems either to his back or knee.

Although Dr. Prostic suggests that as of March 2000, when he first examined claimant, claimant bore a 10 percent whole body impairment to the back, at no time does he attribute that 10 percent to this accident. In fact, no physician does. Only respondent and its subsequent carrier, CGU, suggest that claimant had permanent impairment to his back before March 2000.

As for the knee, it appears that no physician attributed any specific amount of permanency to the September 1999 injury. This is understandable given the insignificant nature of the accident.

Under these facts and circumstances, the Board finds no reason to disturb the ALJ's conclusion that claimant failed to meet his evidentiary burden to establish permanency. Accordingly, the ALJ's findings and conclusions on the issue of permanency in this docketed claim are affirmed. The Board must, however, modify the Award to clarify claimant's entitlement to the $813.99 paid by respondent for medical treatment. And the Award is further modified to allow claimant future medical benefits upon proper application to the Director.

Docket No. 255,055

This claim involves an alleged knee and low back injury. Because the back injury represents an unscheduled injury, claimant asserts that he is entitled to a work disability under K.S.A. 44-510e(a). The ALJ concluded claimant failed to establish that he suffered any permanent impairment as a result of this accident. The Board has considered this finding and disagrees. The Board concludes that claimant has established he sustained a 10 percent whole body permanent impairment as a result of his March 13, 2000 accident. This finding is based upon the testimony of Dr. Prostic who testified that as of October 2000, claimant had a 10 percent impairment as a result of his back injury. In addition, claimant testified that it was his March 2000 accident that gave rise to a distinct onset of back complaints that did not resolve. For this reason, the Board modifies the Award to reflect a 10 percent permanent partial whole body impairment.

When an injury does not fit within the schedules of K.S.A. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

That statute must be read in light of *Foulk*[31] and *Copeland*.[32] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a) (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[33]

The ALJ concluded first, that claimant had no task loss. He believed the task loss evidence offered through Dr. Prostic and Dr. Rose lacked specificity, in that it failed to

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[31] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[32] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[33] *Id.* at 320.

explain what tasks were lost due to the injury that occurred in March 2000. The physicians merely rendered an opinion when asked of which tasks could now be done, including those he had performed in the years since his departure from respondent's employ. The ALJ also took issue with several tasks that were performed by claimant, post-injury, while working for 2 other employers. Both Dr. Prostic and Dr. Rose commented on how claimant was unable to perform at least 5 of those tasks. Yet, the evidence revealed (and the ALJ noted) that claimant actually was able to perform those tasks and did so for an extended period of time, working for one employer for approximately 6 months and for Washburn University for a period of years. Thus, in the ALJ's mind, their opinions as to claimant's capacity was compromised.

The Board has reviewed the physicians' opinions and concludes that, unlike Dr. Rose, Dr. Prostic's task loss analysis does differentiate between those tasks, as pre-injury, and could or could not be done due to the knee or the back injury. After close scrutiny of the tasks and his testimony, Dr. Prostic opined that claimant had lost the ability to perform 10 of the 19 tasks identified due to his back injury. This yields a 53 percent task loss and the Board modifies the Award to reflect this finding.

Claimant also takes issue with portions of the ALJ's calculation regarding his wage loss. Claimant believes the ALJ appropriately found a 100 percent wage loss from June 18, 2000, the date he was terminated by respondent and up to December 17, 2000, the date he became employed again. Respondent and CGU do not take issue with the 100 percent wage loss during this period. Claimant was receiving unemployment benefits and there is no argument that claimant was not putting forth a good faith effort to find employment. For that reason, the 100 percent wage loss during the period from June 18, 2000 and up to December 17, 2000 is affirmed.

And there is no dispute that claimant sustained a wage loss while employed at Mainline Printing and at Washburn.[34] While employed at Mainline Printing his average weekly wage was $360.00. This wage reflects a 28 percent wage loss ($498 vs. 360). Then once he left that employ and began working for Washburn University, where his wage was $422 per week, his wage loss decreased to 15.2 percent. These figures are slightly different from that contained within the ALJ's Award and they reflect a stipulation as to average weekly wage at the oral argument. Thus, the Award is modified to reflect the change.

Given the 53 percent task loss which remains the same throughout, the revised work disability figures are as follows:

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[34] Based upon the parties' stipulation at oral argument, the wage loss for the period of employment at Mainline Printing is 28 percent (figure this - 498.00 pre injury compared to $360). While employed at Washburn University, the wage loss was 15 percent (figure this $498 pre injury compared to $422).

June 19, 2000 - December 17, 2000: 53 percent task loss and 100 percent wage loss yields a 76.5 percent work disability, followed by -

December 18, 2000 - June 17, 2001[35]: 53 percent task loss and a 28 percent wage loss yields a 40.5 percent work disability, followed by -

June 18, 2001 to May 18, 2004[36]: 53 percent task loss and a 15.2 percent wage loss yields a 34.1 percent work disability.

After claimant lost his job in May 2004, the work disability issue became more problematic. Claimant contends the ALJ's decision to impute his Washburn University wages was in error. Claimant frames his argument as follows:

> The ALJ imputed a wage to claimant equal to the wage he was earning at Washburn before being terminated due to Washburn being unable to accommodate his restrictions. Claimant contends it is not proper to impute a wage based upon employment which claimant is not able to perform and from which claimant has been discharged due to inability. If a wage were to be imputed, it should be based upon evidence of actual earning ability, not a wage based upon employment the evidence shows claimant cannot perform.[37]

Claimant suggests that he was never able to do those jobs following his injuries (as evidenced by his subsequent injuries), and that he should not now be punished for exceeding his restrictions, lest he be accused of sabotaging his post-injury work efforts. Thus, the ALJ should not have imputed claimant's Washburn wages when computing the work disability.

Respondent and CGU stridently argue that claimant's subsequent work injuries act as an intervening accident and thereby eliminate any liability. Not only did claimant go on to perform (for Washburn University) some of the same pre-injury tasks in a remarkably similar job as he had done for respondent, he suffered two injuries, the second one to his back that resulted in restrictions that prohibited him from returning to his pre-injury position with that employer. As a result, Washburn University terminated his employment in May 2004. In fact, even claimant concedes his termination from Washburn University was not causally related to his work-related injuries with this respondent.

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[35] The record does not reflect a start date on claimant's employment with Washburn University and as a result, both the ALJ and the Board must, for convenience purposes, use this date to calculate the work disability.

[36] In the absence of any precise date, the Board will utilize this date for purposes of computation.

[37] Claimant's Brief at 4 (filed Jan. 13, 2006).

Intrinsic to the Act is a requirement that there be some type of causal connection or nexus between the injury and the disability for which the benefits are being awarded. Put simply, the injury must arise out of the employment.[38] In the case of work disability this requires, in our view, a connection between the injury and both the task loss and the wage loss. K.S.A. 44-510e. In the case of the task loss, the causation requirement is obvious. The task loss factor is based on loss of ability resulting from the injury. In the case of wage loss, the causation requirement is less explicit. The express language of K.S.A. 44-510e requires only a calculation of the percentage difference between the wage at the time of the injury and the wage after the injury. On its face, the language of the statute suggests the reason for the change in pay is irrelevant. Nevertheless, the Board believes the fundamental function and purpose of the Act expects that there be a link between the injury and the wage loss before that loss can be a factor used to calculate the amount of benefits.

The Board concludes that claimant's subsequent injuries while working for Washburn University constituted an intervening injury that cuts off respondent's responsibility for a work disability. Stated another way, claimant lost his position with Washburn University and suffered a wage loss due to his subsequent injury, not his March 2000 injury while in respondent's employ. Because claimant suffered an injury to the same area of the body, and that injury caused the claimant's loss of a job and corresponding wage loss, respondent and CGU are no longer liable for a work disability.

As for the potential credit for the monies claimant received for what have been described as retirement benefits, the Board is unable to determine the source of those monies and whether a credit is appropriate. Absent more information, the Board is unable to determine whether a credit is appropriate under K.S.A. 44-501.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated November 21, 2005, is affirmed in part and modified in part as follows:

Docket No. 236,907

The balance of the ALJ's Award for this docket is affirmed, but is modified in part to reflect the following:

The claimant is entitled to 54.57 weeks of temporary total disability compensation at the rate of $321.354 per week in the amount of $17,536.07 followed by 50.11 weeks of

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[38] *Craig v. Electrolux Corporation*, 212 Kan. 75, 510 P.2d 138 (1973).

permanent partial disability compensation, at the rate of $321.35 per week, in the amount of $16,102.85 for a 37 percent impairment to the right lower extremity, making a total award of $33,638.92.

Respondent is also ordered to pay claimant's medical bills associated with the knee injury including the knee replacement, and including those attached to the regular hearing transcript.

Docket No. 239,983

The ALJ's determination for this docket is affirmed.

Docket No. 247,912

The ALJ's determination for this docket is affirmed.

Docket No. 247,913

The ALJ's determination for this docket is affirmed in part and modified in part, making respondent responsible for paying claimant's medical benefits in the amount of $813.99.

Docket No. 255,055

For this docket the ALJ's Award is modified as follows:

The claimant is entitled to 25.86 weeks of permanent partial disability compensation at the rate of $332.02 per week or $8,586.04 for a 76.50 percent work disability followed by 26.00 weeks of permanent partial disability compensation at the rate of $332.02 per week or $8,632.52 for a 40.50 percent work disability followed by 89.66 weeks of permanent partial disability compensation at the rate of $332.02 per week or $29,768.91 for a 34.10 percent work disability, making a total award of $46,987.47.

As of April 6, 2006 there would be due and owing to the claimant 141.52 weeks of permanent partial disability compensation at the rate of $332.02 per week in the sum of $46,987.47 for a total due and owing of $46,987.47, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of April, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

Concurring and Dissenting Opinion

The undersigned Board Members respectfully dissent from that portion of the majority's opinion in Docket No. 236,907. These members maintain the claimant failed to meet his evidentiary burden to establish his knee replacement was causally related to the February 2, 1998 accident. The knee replacement surgery occurred in February 2003, well after the first knee injury and his change in employers. The record simply does not disclose any persuasive testimony that would suggest the knee replacement surgery was attributable to any one of claimant's injuries over another. For that reason, these members would find that the claimant's functional impairment would be limited to 12 percent to the right knee rather than the 37 percent awarded by the majority. In all other respects these members concur with the majority's opinion set forth above.

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BOARD MEMBER

Concurring and Dissenting Opinion

The undersigned Board member hereby adopts the Dissent set forth above and respectfully dissents from the majority's decision in Docket No. 255,055 on the issue of claimant's task loss. The majority grants a task loss based upon an analysis of the claimant's pre-injury tasks. But included among those tasks that Dr. Prostic excluded are 5 tasks that the claimant went ahead and performed at his subsequent jobs for a significant period of time. When those tasks are included in the ultimate work disability figure, in effect claimant is monetarily rewarded for lost tasks that he has not, in fact, lost. He went on to perform those lost tasks while working for Mainline Printing and Washburn University. This Board Member would have excluded those tasks from the computation.

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BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Gregory D. Worth, Attorney for Resp. and Continental National American
Michael R. Kauphusman, Attorney for Resp. and General Accident Insurance/CGU
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director